ZAKARIA CHE SOH

v.

CHOOI KUM LOONG & ANOR

HIGH COURT MALAYA, IPOH
EDGAR JOSEPH JR J
[CIVIL APPEAL NO. 16 OF 1982]
3 APRIL 1985

TORT: *Vicarious liability - Negligence of servant/agent - Whether at the moment of collision, the driver of motor vehicle was using vehicle for own private purpose or as agent of master.*

In the Court below, the learned President exempted the Government of Malaysia from vicarious liability in an action brought against it by an injured party (the first respondent) involving a motor vehicle allegedly driven by its servant/agent (the appellant). It was a common ground here and in the Court below that the vehicle was owned by the Government and driven by the appellant, its employee. In the Court below, the first respondent sued both the appellant and the Government and obtained judgment by consent against the former but failed altogether against the Government. This appeal is brought by the appellant and not the respondent. In the Court below, the learned President did not find against the Government because he found that the appellant driver was actually on his way home for lunch when the collision occurred. He held that this was not within his employment and that the Government was therefore not vicariously liable. The learned President based his decision on a translation of two letters and this is fully discussed in the judgment.

Held:

[1] The only evidence as to the actual collision and surrounding events consist of two letters which have been translated into English and both written several months after the event. One was from the appellant driver and the other from his head of department, both addressed to the Attorney-General.

[2] It is a presumption of law that proof of ownership of a motor vehicle that has been driven negligently is some evidence to show that the driver was the servant or agent of the owner. However, this presumption is rebuttable by proof of actual facts. In this case, the facts reinforce the presumption of law because the appellant driver was employed by the Government to drive the vehicle concerned and did so on the specific instructions of his head of department.

[3] In this appeal, no question of credibility arises but the question is one concerning the construction or meaning of the letters. It is for this reason that the ambiguity in the letters should be resolved in favour of the appellant driver and against the Government.

[4] On the documentary evidence, the Court below was wrong in finding that the appellant driver was on his way home to have lunch.

[5] The important thing is that whatever the appellant driver was doing at the time of the collision, he was doing so with the express authority of his head of department. The Government is thus vicariously liable. The principle from the cases cited is whether the manner of doing the act was not so far remote from anything contemplated by either party as to take the act out of employment.

[Appeal allowed. Order of learned President set aside. Judgment for plaintiff in the sum of agreed damages.]

Cases referred to:
Barnard v. Sully 47 TLR 557
Ng See Hem v. The Official Assignee, Federation of Malaya [1953] MLJ 32
Karthiyayani & Anor. v. Lee Leong Sin & Anor. [1975] 1 MLJ 119
Saimin bin Hassan v. Government of Malaysia [1976] 2 MLJ 211
Hilton v. Thomas Burton (Rhodes) Ltd. & Anor. [1961] 1 WLR 705
Davidson v. M'Robb [1918] AC 304
Crook v. Derbyshire Stone Ltd. & Anor. [1956] 1 WLR 432
Ormrod & Anor. v. Grossville Motor Services Ltd. [1953] 2 All ER 753
Higbid v. R.C. Hannet Ltd. [1932] 49 TLR 104
Pepper v. Sayer [1914] 3 KB 994
Martin v. J. Lovibond & Sons Ltd. [1914] 2 KB 227
Cook v. Bell Brothers [1937] 30 BWCC 132
Low v. General Steam Fishing Co. Ltd. [1909] AC 523
Armstrong v. Redford [1920] AC 757
Pierce v. Provident Clothing & Supply Co. [1911] 1 KB 997
M'Neice v. Singer Sewing Machine Co.[1911] 4 BWCC 351 CS
Butt v. Provident Clothing & Supply Co. [1913] 6 BWCC 18

For the appellant - R. Jegatheesa; M/s Mogan & Co.
For the 1st respondent - Not Represented
For the 2nd respondent - Tee Geok Hock, FC

JUDGMENT

Edgar Joseph Jr J:

The point central to this appeal is whether the learned President was right in exempting the Government of Malaysia ("the Government") from vicarious liability in an action brought against it by an injured party ("the Plaintiff") involving a motor vehicle allegedly driven by its servant or agent ("the Defendant driver"). It being common ground both here and in the Court below that the vehicle was owned by the Government and driven by the Defendant driver, its employee, the sole and narrow question for decision was whether at the moment of collision, the Defendant driver was using the vehicle for his own private purpose, so as to constitute a break in his employment as driver, thus relieving the Government from all liability.

Before I embark upon a discussion of the merits of this appeal mention must be made of three preliminary matters.

In the first place, although in the Court below the Plaintiff sued both the Defendant driver and the Government and obtained judgment by consent against the former but failed altogether against the latter, he did not appeal. It was only the Defendant driver who did so Before me, therefore, the contest was between the two defendants. Nevertheless, the Plaintiff was cited as the other respondent to this appeal; presumably because he might in a sense be affected by its outcome.

In the second place, the only evidence as to the circumstances in which the collision occurred was documentary, consisting of English certified translations of two letters (pp. 16-19), written several months after the event, one from the Defendant driver and the other from his head of department, both addressed to the Attorney General. This was unfortunate since the contents of these letters were, somewhat meagre and lacking in precision. They should have

a been, but were not, amplified by oral evidence; in other words, the authors ought to have been called as witnesses and perhaps the police report (if any) put in. In fairness to the learned President, however, it should be said, that neither Counsel made any attempt to call such evidence.

Be that as it may, at the behest of Counsel for the Government, and with the Consent of Counsel for the Defendant driver, I admitted the original letters Concerned and marked them *b* "A" and "B" respectively. The need for this will become apparent later on in this judgment.

In the third place, there is the question as to the onus of proof.

As was pointed out by Scrutton LJ in the case of *Barnard v. Sully* 47 TLR 557 proof of ownership of a motor vehicle that has been driven negligently is some evidence to show that the driver was the servant or agent of the owner. Generally, however, this presumption *c* is not very helpful for it is one which can be rebutted by proof of the actual facts. In this case, however, the presumption is reinforced by the fact that the Defendant driver was employed by the Government to drive the vehicle concerned and did so on the specific instructions of his head of department. It is my opinion, therefore, that the presumption that he was its servant or agent at the moment of collision, in the absence of proof to the contrary, has double force.

d

Accordingly, any ambiguity in the letters aforesaid would have to be resolved in favour of the Defendant driver and therefore against the Government.

I might perhaps add that I have not overlooked the principle that onus is an important matter only where there is doubt as to which side should be believed and no evidence or no sufficient evidence to establish the allegation of one side or the other has been given. (*Ng* *e* *See Hem v. The Official Assignee, Federation of Malaya* [1953] MLJ 32). In this appeal, no question of credibility arises but there are questions concerning the construction or meaning of the letters. It is for this reason that I have said that any ambiguity in the letters should be resolved in favour of the Defendant driver and against the Government which has alleged in its Statement of Defence that the former was not its servant or agent at the material time.

f I now turn to consider the merits of this appeal.

In his reasons for decision the learned President decided the issue central to this appeal in favour of the Government because he found that the Defendant driver:

> "though driving the department's official car with the permission of the head of department ... was actually on his way home for lunch and was not within his employment...".

g In the result, he held that the Government was not vicariously liable for the consequences of the negligent driving regard being had to the principles enunciated in any array of cases cited to him namely, *Karthiyayani & Anor. v. Lee Leong Sin & Anor.* [1975] 1 MLJ 119; *Saimin bin Hassan v. Government of Malaysia* [1976] 2 MLJ 211; *Hilton v. Thomas Burton (Rhodes) Ltd. & Anor.* [1961] 1 WLR 705; *Davidson v. M'Robb* [1918] Appeal Cases 304, 327; *Crook v. Derbyshire Stone Ltd. & Anor.* [1956] 1 WLR 432; *Ormrod & Anor. v. Crosville* *h* *Motor Services Ltd.* [1953] 2 All ER 753; and *Higbid v. R.C. Hannet ltd.* [1932] 49 TLR 104.

This brings me to a consideration of the translations of the two letters, upon which the learned President grounded his decision. They are sufficiently important to merit reproduction in full.

The letter dated 26 May 1981 from the Defendant driver reads as follows:

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Translation "A"

Zakaria b. Che Soh,
Institut Penyelidikan Galian,
Malaysia,
Peti Surat 1016,
Lorong Harimau,
Ipoh.
26 May 1981.

Attorney General,
Attorney General's Department,
11th Floor, Bank Rakyat Building,
Jalan Tangsi,
Kuala Lumpur.

Through: Director,
Minerals Research Institute,
Minerals Department of Malaysia,
Ipoh.

Sir,

Re: Accident on 9 October 1980 along Jalan Anderson, Ipoh involving AAB 8008 and BBB 6740

I refer to your letter ref: PM (SIVIL) 3778 dated 14 April 1981 in respect of the above matter. I wish to express my profound regret with your decision and I apply to appeal same.

On 6 October 1980 at 7.30 p.m. I was with the Director of Mineral Research Institute and we left Ipoh to go to Kuala Lumpur to carry out official duties for three days. As it was getting dark and we had to stay in Kuala Lumpur for about three days, the Director and I brought along the daily necessities including testing equipment, reports, clothings to be used while on duty and other personal belongings. We were carrying out geotechnic investigation to ensure the safety of land slides at the mines.

The Director and I went back to Ipoh on 9 October 1980 and reached the Mineral Research Institute at 12.50 p.m. and unloaded the equipment and Government documents to the Laboratory and office. After that the Director and I sent the personal belongings to the staff's respective houses (The Director and I) as instructed by the Director as he had to start work at his office before 2.00 p.m. I took a short cut in order to complete the task (to unload the equipment of fieldwork) i.e. through Jalan Anderson but unfortunately, when I came to St. John's Ambulance Hall, a student suddenly crossed the road from the left to the right and was heading towards my car. In order to avoid colliding into the student I swerved to the right and immediately braked. All of a sudden m/car No. BBB 6740 coming from the opposite direction collided into the m/car driven by me.

Following the accident I lodged a report at the Police Station vide my Report No. CTR. 1603/80. After that I tried to telephone the Director at his residence about the accident but failed as his phone was out of order. The Police Report given by me was a brief one and did not explain in detail the use of a Government vehicle. What was stated in the Report was about the accident only.

I sincerely hope that you will reconsider this matter. The accident was unexpected, not done on purpose and I was not negligent.

Thank you.

Sgd.

Checked, corrected and certified by
Sgd.

.....
(Omar b. Salleh) Malay Interpreter
Sessions Court II
IPOH

The letter dated 13 July 1981 from the Defendant driver's head of department reads as follows:

TRANSLATION "B"

PN (SIVIL) 3778
29/54/U/(21)
13 July 1981.
(10hb. Ramadzan,1401)

Attorney General,
Malaysia,
11th Floor, Bank Rakyat Building,
Jalan Tangsi,
Kuala Lumpur.

Sir,

Re: Accident on 9 October 1980 along Jalan Anderson, Ipoh between M/car AAB 8008 and BBB 6740

I refer to the above matter wherein an accident occurred involving a Government vehicle No. AAB 8008, Ford Cortina driven by a Government driver namely Zakaria b. Che' Sob and vehicle No. BBB 6740 owned and driven by a member of the public. The accident occurred on 9 October 1980.

Herewith I attach the appeal and explanation letter of the said driver Che Zakaria b. Che' Soh, on whom I have given the task of driving the m/car that was involved in the collision. As stated in para. 2 and 3 of the driver's letter, it is common practice for the Institute's staff who are employed as drivers to drive Government vehicles when carrying out their duties to the sites of search minerals project, mining and other projects all over West Malaysia and to transport equipment, other necessary things required for the field work, to transport things from the houses to office and to return these equipment to their respective places after the completion of the field work.

As stated earlier, the staff of Mineral Research Institute would take the opportunity to eve lunch at any place while they were on duty doing field work. In view of that, I as the Director of the Institute had told the driver to go home for his lunch after his long drive as he had to drive me to a meeting at 2.00 p.m. on the day the accident when occurred.

With the aforesaid reasons, I officially state that the accident on 9 October 1980 occurred when the Government driver, Zakaria bin Che's Soh was out his duty on the Institute's Director's instruction.

Sgd.

c.c.1. Ketua Merinyu Galian
Malaysia,
Jalan Gurney,
Kuala Lumpur.

2. Encik Zakaria bin Che's Soh,
Drebar,
Institut Penyelidikan Galian,
Ipoh.

Checked, corrected and certified by
Sgd.

.....
(Omar b. Salleh) Malay Intepreter
Sessions Court II
IPOH.

Clearly, from these translations, at the time of collision the Defendant driver was not on his way home to have lunch but **"to unload equipment for field work".** However, the letters themselves, as opposed to the translations, disclosed that at the time of collision the Defendant driver was on his way **"to unload belongings carried while on duty".**

Although the original versions would appear to be more general and in fact somewhat vague when compared with the translated versions the two were not necessarily so divergent as to be irreconcilable.

Be that as it may, the learned President's finding that the Defendant driver was *on his way home to have lunch* was contrary to the evidence before him. Indeed, it would be contrary to the evidence on either the original or translated versions of the letters. Accordingly, his conclusion that the Defendant driver was not driving as servant or agent of the Government acting in the course of employment at the material time, since he was not doing something he was employed to do, was based upon a false premise.

It is my opinion, that whether the Defendant driver was, at the material time, on his way "to unload equipment for field work" or "to unload belongings carried while on duty" the important thing to note is that he did so with the express authority of his head of department. It was thus as plain as a pikestaff that he was acting in the discharge of his duties. The Government was thus vicariously liable in accordance with the principles enunciated in the cases cited.

Having made these observations, I would go further and hold that regard being had to the circumstances of this case, even if the Defendant driver was on his way home for lunch at the time of collision, as found by the learned President, the Government would still be vicariously liable.

In arriving at this conclusion, I have applied the principle that an act though strictly not one which an employee is required by his employment to perform is still to be regarded as within the sphere of his employment if it is a reasonable or necessary thing to do under all the circumstances unless it has been expressly or impliedly excluded from his employment. The test is whether the manner of doing the act was not so far remote from anything contemplated by either party as to take the act out of the employment: *Pepper v. Sayer* [1914] 3 KB 994.

Approaching the problem in this way, and looking at the circumstances as a whole, the Defendant driver after returning to his base in Ipoh from Kuala Lumpur on official duty had dropped his head of department home and was to pick him up a little later the same day to attend an official meeting. During what would have been his normal lunch break he also had to perform certain official chores like discharging "equipment for field work" or "belongings carried while on duty", as the case may be, and also to have his lunch. This he was expressly authorised by his head of department to do and, indeed, it was in conformity with previous practice.

I would pause to observe that there is nothing unreasonable in such practice since an employee is not a machine and must be treated as likely to act as employees ordinarily would during such an interval. Indeed, going for lunch after a long haul was perhaps necessary if

the Defendant driver was to be in a fit state to drive his head of department that afternoon to attend a meeting. It is a notorious fact that many road accidents are caused because drivers, due to lack of food or refreshment, are simply not fit enough to drive.

In my search for authority I have uncovered certain cases from which I have been able to derive analogical support for my conclusion regarding this part of the case.

In *Marlin v. J. Lovibond & Sons Ltd.* [1914] 2 KB 227 a drayman's employment kept him about the streets without any regular intervals for meals, it was held to be incidental to his employment that he should leave his dray during the course of the day for purpose of obtaining a glass of beer. After an absence of two minutes, he left the public-house to return to his dray, and while crossing the road was knocked down by a motor car, sustaining injuries from which he died.

It was held there was no break in the employment; what the man did was reasonably incidental to his employment; that he was exceptionally exposed to street accidents and that the accident therefore arose out of and in the course of the employment for the purpose of the Workmen's Compensation Act 1906.

In the course of his judgment Cozens-Hardy MR said at p. 230:

> In these cases it is necessary to consider the nature of the employment, the obligations of the man with reference to his employment, and all the circumstances, before one can arrive at a conclusion.

And further down the same page he said this:

> I feel great difficulty in seeing that under circumstances like these the driver of the dray is not equally entitled to procure reasonable liquid refreshment for himself, not deviating from the course of his route, not lingering in the public-house, but simply going in and getting a glass of beer as in this case, and returning at once to his dray. I therefore think there was no breach of the course of his employment, and that the accident did happen in the course of his employment.
>
> Then it is said, and in truth, that the accident must arise not merely "in the course of" but 'out of the employment and that this man was no more exposed to the risk of being knocked down by a motor car than any other member of the public. I cannot assent to that.

And, in the concluding paragraph of his judgment he said this:

> The learned Judge held that what the man did was not only in the course of his employment, but was done perfectly reasonably not unreasonably in any way. He has held that what he did was really done in order to enable him to better discharge his duties as a drayman for his employers. I hold that there is no ground for differing from his decision.

And, this is what Sir Samuel Evans, President, said at p. 231, Para. 2 of the judgment:

> ... on the day in question he goes to the public-house, not as a loafer, or as a lounger, or a man addicted to drink, but for purpose of refreshing himself with one glass of beer, and the whole period of his absence, including the time taken up in ordering the refreshment and its consumption, the learned Judge says was only two minutes. It is said that the accident occurred to this man while going back to his dray did not arise out of or in the course of his employment. Personally, I am very glad that the learned Judge has found that what he did was a reasonable incident of his employment. In my opinion he was justified in so finding. If he had found that there was an implied term in his contract of service that the man should be allowed to take refreshment in this way during the twelve hours, I think no Court would have disturbed
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> his finding. The learned Judge was amply justified in coming to the conclusion that the accident to the deceased, in the circumstances, arose out of and in the course of his employment.

And, this is what Eve J said:

> The employment in this case was of a character which I think may be properly define as continuous and peripatetic. It was an employment in which the workman was exceptionally expose to street accidents. The peripatetic character of the employment made the accident one 'arising out of the employment,' and its continuity made it one 'arising in the course of the employment,' I think the learned Judge is quite right.

In *Cook v. Bell Brothers* [1937] 30 BWCC 132, 136 the evidence disclosed that during a meal time interval in his employment of fixing filters and pipes in open air baths the applicant heard water was splashing through a discharge pipe into the boiler house where, if sufficient in quantity, it might damage the boiler. The applicant, without the authority or knowledge of the foreman, took some clay to block up the pipe and while returning for more clay fell and injured himself; the Judge found that the quantity of water splashing was not in fact harmful but the applicant thought it was and compensation was awarded. On appeal Slesser LJ said:

> The learned Judge has come to the conclusion in his judgment that this man was doing an act which was reasonably necessary and incidental to his employment. Now there is no magic about the word "duties". The test is whether it was within the contractual relationship between the parties that not only should the man do specific work directed to be done but that he might also, in the interest of his employers, do something either necessary or incidental to that work.

In the result the appeal failed.

In *Low v. General Steam Fishing Co. Ltd.* [1909] AC 523 a watchman's duties required him occasionally to leave the trawlers he was minding and to go on the quay against which they were moored. In the course of his watch he left the trawlers and went to a hotel which was a short distance away from the harbour where he got half a glass of whisky and a glass of beer. He was absent a very short time, and on his return to the quay, while descending an affixed ladder attached to the quay to go on board one of the trawlers, he fell into the water and was drowned. It was held the accident arose "out of and in the course of" the employment within the meaning of the Workmen's Compensation Act 1906.

Lord Ashbourne said, *inter alia*, at p. 533:

> If the deceased had met with the fatal accident at the hotel or before he had returned to the scene or sphere of his duty, I would be disposed to concur, but the workman had returned to the quay, where he had a right to be, and was about to enter a trawler, where he had a right to go. He was within the scope and scene of his duty on both quay and trawlers; he had a right to leave the trawler for the quay, and the quay for the trawler. He was not at the time of the accident going back to or returning to his employment; he had already, I think, come back when he had reached the quay and was ready to resume his watch: *Moore v. Manchester Liners Ltd.* [1909] 1 KB 417. He had a long guard or watch of twenty-five hours, and if it was intended that he should have no right to go "a short distance fora very short time" for refreshment it would have been more satisfactory if there had been some finding on the subject.

In *Davidson v. M'Robb* (ibid.) at p. 321 Lord Dunedin said, referring to the course of employment:

> It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work, or the natural incidents connected with the class of work - e.g., in the workman's case the taking of meals during the hours of labour; in the servant's, not only the taking of meals, but resting and sleeping, which follow from the fact that domestic servants generally live and sleep under the master's roof.

In *Armstrong v. Redford* [1920] AC 757 a workman whilst returning to work after dinner time was injured by slipping on the stairs of a canteen provided for the use of workmen by the employers although access to it was only obtainable from the public street.

Lord Parmoor at p. 778 said, *inter alia;*

> The meaning of the words "in the course of employment" has been determined in this House in the case of *Davison v. M'Robb*. "In the course of employment" does not mean during the currency of the engagement, but means in the course of the work which the workman is employed to do and what is incident to it." I think that a mid-day meal may be incidental to an employment such as that of the respondent, which commenced at six in the morning, and that the taking of such a meal did not as a matter of law in itself, and apart from special circumstances, create an interruption in the course of her employment. There are no special circumstances in the present case such as for instance arise when an employee is away from his work not in the course of employment, but for his own pleasure or business.

And, at p. 779 he said, *inter alia*, this:

> In the street accident cases it has been held that a street accident of an ordinary character, such as all persons using the street might be liable to, does not arise out of employment or, in other words, that there is no casual relationship between the accident and the employment, which would support a claim for compensation. If however, as in the bicycle case. the workman is engaged at the time of the accident in the actual work for which he is employed, it will not defeat his claim that the accident was in its character an ordinary street accident. In the present case there is a casual relationship between the employment and the accident and the claim is not defeated because any person using the stairs in the ordinary way might have slipped with the same consequential injury.

The cases show that the method of the workmen's progression - whether on foot, on a bicycle or on a public or other vehicle - is of no importance provided the risks are incurred while doing the work he is employed or authorised to do. In considering the means of his progression the only question appears to be whether in adopting those means he was acting with the knowledge or acquiescence of his employer: *(Pierce v. Provident Clothing & Supply Co.* [1911] 1 KB 997; *M'Neice v. Singer Sewing Machine Co.* [1911] 4 BWCC 351 CS and *Butt v. Provident Clothing & Supply Co.* [1913] 6 BWCC 18 CA).

In the instant case, if as found by the Court below, the Defendant driver was on his way home for lunch when the collision occurred, he was then driving a vehicle - something he was employed to do - and when he went for lunch he was doing something not only with the knowledge of his employer's representative, namely his head of department, but in fact, upon specific instructions.

I therefore have no hesitation in holding, having regard to the circumstances as a whole, that at the moment of collision, the Defendant driver was driving the motor vehicle concerned as servant or agent of the Government within the meaning of the authorities and, it accordingly is vicariously liable for his admitted negligence in such driving.

Accordingly, the appeal is allowed, the order of the learned President dismissing the claim against the Government is set aside and I substitute in its place judgment for the plaintiff in the sum of nine thousand and eighty-two dollars and eighty-six cents (RM9,082.86) these being the agreed damages. The Defendant driver will also have the costs both here and in the Court below and a refund of the deposit paid by way of security for costs of the appeal.

Also found at [1985] 1 CLJ 310